

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-207518

DATE: November 17, 1982

MATTER OF: American Sterilizer Company

DIGEST:

1. Later-filed materials, filed after a timely initial protest, are for consideration where the materials raise no new grounds of protest, but merely provide additional legal arguments in support of initial protest.
2. Where solicitation contained experience requirement which constituted a definitive responsibility criterion and the record shows the contracting officer considered evidence submitted by bidder and applied criterion, protest against affirmative responsibility determination is denied. Sufficiency of evidence is matter for contracting officer's subjective judgment which GAO does not review.

American Sterilizer Company (AMSCO) protests the award of a contract to Environmental Techtronics Corporation (ETC) by the Department of the Army (Army) under solicitation (IFB) DAMD17-82-B-0013 to provide and install laboratory sterilizers.

One specification of the IFB required that:

"g. The manufacturer must have experience in the manufacture of this type of sterilizer and must furnish a list of three locations of installations of the biohazardous facility using the equipment."

AMSCO contends that either ETC's bid was nonresponsive in that its bid failed to list three biohazardous facilities using its equipment or that ETC failed to meet a definitive responsibility criterion by not affirmatively demonstrating that it had placed its equipment in three biohazardous facilities.

The Army contends that, while AMSCO's initial protest was timely, AMSCO's later-filed materials raised new grounds of protest and were thus untimely. The Army also contends that the issue of ETC's compliance with the specifications relates to ETC's performance capability and, thus, is a matter of responsibility. The Army further argues that the requirement in question is not a definitive responsibility criterion, but if we find it to be such, then ETC has satisfied the requirement. We find the protest timely but without merit and deny it.

ETC's bid included a list of only two locations of biohazardous facilities using its equipment. During the preaward survey, the contracting officer determined that the two facilities ETC had listed were not biohazardous. She then contacted ETC, which gave her three other references to check for compliance with the requirement. The contracting officer considered these three references and found them satisfactory. She subsequently executed a determination of responsibility in ETC's favor.

AMSCO contends that the requirement goes to the history of a particular product as opposed to the experience of the bidder and, as such, is a matter of responsiveness. It claims ETC was nonresponsive in failing to list three biohazardous facilities using its equipment. Alternatively, AMSCO argues that the requirement is a definitive responsibility criterion in that it is a specific and objective experience requirement that ETC has failed to fulfill. AMSCO contends that one of the three facilities which the contracting officer considered was not biohazardous and that, therefore, ETC failed to demonstrate affirmatively its responsibility.

Regarding the timeliness of the later-filed materials by AMSCO, we will generally consider later-filed materials which merely provide support for an already timely protest. Kappa Systems, Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD 412. This rule presumes a timely initial protest that merely lacks detail. Kappa Systems, Inc., above. Here, AMSCO's initial protest stated the factual basis for its protest, that is, that ETC had failed to comply with the above-noted requirement and AMSCO's later-filed materials merely provided additional legal arguments in support of its initial protest. The later-filed materials thus raised no new grounds of protest and are for consideration in support of the initial protest.

We recognize a distinction between solicitation requirements relating to a bidder's capability and experience and those which are concerned with the history of the product's performance and reliability. The experience of a bidder is a matter of responsibility and the performance history of a product is a matter of responsiveness. E.C. Campbell, Inc., B-203581, October 9, 1981, 81-2 CPD 295. Here, we find the clause relates to the experience of the bidder and its prior installations, not the successful performance of the item and, therefore, a matter of responsibility.

While normally we will not review an affirmative responsibility determination, we do so when the protester shows fraud on the part of the procuring officials or, as is alleged in this protest, the solicitation contains definitive responsibility criteria which allegedly have been misapplied. Gaffny Plumbing and Heating Corporation, B-206006, June 2, 1982, 82-1 CPD 521.

Definitive responsibility criteria are specific and objective standards established by an agency for a particular procurement for the measurement of an offeror's ability to perform the contract. These special standards of responsibility limit the class of offerors to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance, such as specific experience requirements. A.R. & S. Enterprises, Inc., B-201924, July 7, 1981, 81-2 CPD 14. We find this requirement constitutes a definitive responsibility criterion.

However, the scope of our review is limited to ascertaining whether evidence of compliance has been considered because the sufficiency of the evidence is a matter reserved to the subjective judgment of the contracting agency. E.C. Campbell, Inc., B-204253, February 2, 1982, 82-1 CPD 76. Here, the record indicates that ETC provided the contracting officer with five references to check prior to award. The contracting officer stated in her determination of responsibility that she had checked all five references, found three of them satisfactory and, thus, found ETC responsible. Therefore, we find that the Army did apply the definitive criterion of responsibility and, while

AMSCO disputes whether some of the facilities are "bio-hazardous," this relates to the sufficiency or quality of the evidence, which, as noted above, is within the subjective judgment of the contracting officer.

We deny the protest.

Harry R. Van Cleve
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Acting General Counsel